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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ALAN T. S., Petitioner, v. THE SUPERIOR COURT OF ORANGE COUNTY, Respondent; MARY E. T., Real Party in Interest.	G040870 (Super. Ct. No. 95D001083) O P I N I O N

Original proceedings; petition for a writ of mandate to challenge an order of the Superior Court of Orange County, Nancy A. Pollard, Judge. Writ denied.

Alan T. S., Jr., in pro per., for Petitioner.

Law Offices of Steven R. Grecco, Steven R. Grecco and Craig A. Darling for Real Party in Interest.

* * *

This writ proceeding has been brought by a father who lost his children due to a trial court error of law, and who, now in propria persona (or as we will say throughout this opinion, "pro per"), is vainly seeking to scrape up the money to hire a competent lawyer to represent him at the retrial after this court reversed the erroneous custody order and remanded the case for further proceedings.

The full details of this sad case are laid out in the published, companion decision, *Alan T. S. v. Superior Court* (March 18, 2009, G041034). This particularly aspect of it involves the first of Alan's postremand efforts to obtain funds to hire a lawyer.

Suffice to say for this case that after the reversal of a April 24, 2007 order made by Judge Monarch ordering a change in custody from father Alan to the mother Mary, Alan sought to recover some $3,500 in attorney fees which were part of the custody order he had successfully challenged in the appellate court. But Alan, in pro per, had not challenged the attorney fee order in his previous appeal; rather he relied on a "motion for restitution" filed in the wake of the reversal of the custody portion of the order to, in effect, get his money back. The denial of this motion for restitution is the sole basis for the writ petition in this proceeding (G040870).

To the degree that there is statutory authority providing for restitution after reversal, it is now found in section 908 of the Code of Civil Procedure. The plain text of section 908 is clear, though, that restitution is a matter committed to the discretion of the "reviewing" court. The statute nowhere gives trial court authority to order restitution after reversal. At best it allows the reviewing court discretionary authority to "refer" the matter of postreversal restitution to the trial court.

There is, however, case authority for the proposition that courts generally possess "inherent" authority to order restitution after reversal on appeal. (*Rogers v. Bill & Vince's, Inc.* (1963) 219 Cal.App.2d 322, 324 ["the trial court has inherent power to afford such relief"]; *Holmes v. Williams* (1954) 127 Cal.App.2d 377, 379 ["'the power of a court whose order or judgment has been reversed to order restoration after reversal is inherent in that court'"]; *Schubert v. Bates* (1947) 30 Cal.2d 785, 789 ["the power of a

court whose order or judgment has been reversed to order restoration after reversal is inherent in that court"]; *Bank of America etc. v. McLaughlin* (1940) 37 Cal.App.2d 415, 417 ["it has been held that the trial court has the power to order such restitution, which power is inherent and exists independently of any statute"]; accord, *Oldfield v. Bank of America etc. Assn.* (1936) 6 Cal.2d 103, 107 ["There is a general rule that a party obtaining through a judgment, before reversal, any advantage or benefit, must restore what he got to the other party, after the reversal."]; *Levy v. Drew* (1935) 4 Cal.2d 456, 459 ["After reversal the respondent stands in the position of a trustee of appellant of the property obtained under the judgment. Restitution may be sought in the same or in an independent action."].)

One can detect in these cases the underlying theory that such inherent power, even in the trial court and without statutory authorization, is a necessary accommodation to solve the problem of unjust enrichment presented by the fact that judgments (often) may be collected during the pendency of an appeal, yet the appeal may undo the judgment on which a party has collected. (E.g., *Schubert v. Bates, supra*, 30 Cal.2d at p. 791 [emphasizing unjust enrichment when party who has obtained judgment later reversed is allowed to keep it]; *Oldfield v. Bank of America etc. Assn., supra*, 6 Cal.2d at p. 111-112 [noting obligation of party who has "received the benefit of the judgment to make restitution to the other party for what the latter has lost"]; *Rogers v. Bill & Vince's, Inc., supra*, 219 Cal.App.2d at p. 325 [emphasizing constructive trusteeship nature of collecting money prior to finality on appeal].)

What one cannot detect, though, is any sense that the possibility of restitution extends beyond the matter encompassed within the appeal. Thus the "inherent authority" cases invariably involved judgments for money or property, which were not yet final when attacked, such that it was unjust for the loser on appeal to keep the money or property collected in the interim *pursuant to the judgment actually challenged* after the judgment was overturned.

The closest case we have found involving an issue not directly considered in the appeal is *Purdy v. Johnson* (1929) 100 Cal.App. 416, a will accounting case, the

winner of which oscillated back and forth with each subsequent trial and accounting. (*Id.* at p. 418.) The *Purdy* court's analysis was that successful parties should not have to pay the costs incurred by the unsuccessful party (*id*. at p. 421), so all it stands for is the proposition that something inextricably tied to a reversal on appeal, like costs, can be reordered in the wake of that reversal.

Conspicuously absent from the restitution-after-reversal cases are any family law cases, and, in particular, any family law cases where only one part of an order or judgment was attacked, reversed on appeal, and then the winner on appeal sought "restitution" of another part of the family law order or judgment. It does not, however, take much imagination to see why there are no family law cases on this topic: Perhaps no other area of the law is as susceptible to severable judgments or orders than domestic litigation.

When a judgment or appealable order is severable, portions of it that are not appealed from become final. (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2008). ¶ 2:317, p. 2-146.13; cf. Code Civ. Proc., § 906 ["The provisions of this section do not authorize the reviewing court to review any decision or order from which an appeal might have been taken."].)

An order requiring one spouse to pay money for the attorney fees of the other is a classic instance of a family law order which contains severable provisions, and thus must be the subject of an appeal or it becomes final. (See *In re Marriage of Weiss* (1996) 42 Cal.App.4th 106, 119 ["Because Martin did not appeal from the immediately appealable pendente lite attorney fees orders of July 29, 1991 and November 5, 1992, those orders became final and binding upon him."]; accord, *In re Marriage of Skelley* (1976) 18 Cal.3d 365, 368 (*Skelley*) ["When a court renders an interlocutory order collateral to the main issue, dispositive of the rights of the parties in relation to the collateral matter, and directing payment of money or performance of an act, direct appeal may be taken."].)

As the court noted in *Skelley*, courts should look at the substance as to whether a temporary support order is directly appealable. (See *Skelley, supra*, 18 Cal.3d

at p. 368 [“Historically, this court has looked to the substance of an order pendente lite rather than to chronology or to form, and has held temporary support orders directly appealable.”].) In the present case, though, Alan has presented nothing to indicate that the substance of the attorney fee provision within the April 24, 2007 order (which was nothing more than a box checked on a Judicial Council form, specifying $3,500 in amount and giving the name and address of Mary’s attorney) was anything other than a collateral order to pay money for the other party’s attorney fees authorized by Family Code section 2030. As a collateral order it became final when the time to appeal expired without any appeal from it.

We must therefore deny the writ in this case (G040870). Mary will recover her costs in the G040870 writ proceeding.

SILLS, P. J.

WE CONCUR:

ARONSON, J.

IKOLA, J.